Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

No. 92-1945

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PITTSTON COAL GROUP COMPANIES,
Petitioners,
v.
UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ASSOCIATED ELECTRIC COOPERATIVE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

EUGENE E. ANDERECK *
PATRICK A. BAUMHOER
ANDERECK, EVANS, MILNE,
PEACE & BAUMHOER
1111 South Glenstone
Springfield, Missouri 65808
(417) 864-6401
Counsel for Amicus Curiae Associated Electric Cooperative, Inc.
* Counsel of Record

June 14, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AECI AS AMICUS CURIAE	1
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES Page

Associated Electric Cooperative, Inc. v. Holland, C.A. No. 93-0944-HHG (D.D.C.) 3

Rawl Sales and Processing Company v. Trustees, UMWA 1950 Pension Trust, et al., No. 92-1775.. 2

PERIODICALS AND PUBLICATIONS

"Annual Energy Outlook 1993", Energy Information Administration, U.S. Department of Energy (Dec. 1992) 3, 5

"Inventory of Power Plants In the United States, 1991," Energy Information Administration, U.S. Department of Energy (Oct. 1992) 5

"The U.S. Coal Industry, 1970-1990: Two Decades of Change," Energy Information Administration, U.S. Department of Energy (Nov. 1992).... 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1945

PITTSTON COAL GROUP COMPANIES,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF ASSOCIATED ELECTRIC COOPERATIVE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is submitted by Associated Electric Cooperative, Inc. ("AECI") as amicus curiae in support of petitioners.[1]

INTEREST OF AECI AS AMICUS CURIAE

The Trustees' assertion that the Court of Appeals' interpretation of the evergreen clause will have no effect outside the limited sphere of unionized bituminous coal

---

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

mining is incorrect.[2] To the contrary, the Court's decision imposes unanticipated obligations on electric power generators such as AECI.

AECI is a rural electric power cooperative established and incorporated in 1961 under the laws of the State of Missouri. AECI is the wholesale firm power supplier to six regional generation and transmission cooperatives, which in turn supply wholesale power to forty-three distribution cooperatives. These distribution cooperatives serve at the retail level over 1.2 million consumer members in rural Missouri and much of southeastern Iowa.

AECI operates two power generation plants in Missouri at New Madrid and Thomas Hill. These power plants are coal-fired. That is, they burn coal in cyclone boilers to produce steam and, ultimately, electrical energy. During its history AECI, like many other electric power generators, has owned bituminous coal mines to produce coal for its own use. It also has purchased coal from unaffiliated coal mining companies. From 1980 until the end of 1992, AECI owned and operated bituminous coal mines adjacent to its Thomas Hill plant. When AECI acquired these coal mining operations, it became bound by the 1978 National Bituminous Coal Wage Agreement ("NBCWA") as the successor to the prior signatory operator. AECI signed so-called "me-too" agreements in 1981, 1984 and 1988.

The NBCWAs required contributions to the respondent UMWA Trusts, not only for bituminous coal produced and hours worked by UMWA employees, but also for any bituminous coal purchased by a signatory or me-too

---

[2] Brief in Opposition to the Petition for a Writ of Certiorari in *Rawl Sales and Processing Company v. Trustees, UMWA 1950 Pension Trust, et al.*, No. 92-1775 at 6. *Rawl Sales* was consolidated with the instant case in the Court of Appeals. The Court of Appeals' judgment was the same in both cases.

company. As a result of the decision of the Court of Appeals, AECI is subject to a potentially perpetual obligation to contribute to the Trusts at rates negotiated by the BCOA for work performed by UMWA-represented employees at its non-operational mines and, absent a judicial holding that the purchase of coal clause is illegal, for any bituminous coal it purchases, notwithstanding that it is no longer in the coal mining business and is not a member of BCOA.

The Court of Appeals' decision will have a substantial impact on many members of the electric power industry. More than half the electric power plants in the United States are coal-fired and these power plants are perforce either coal mine operators, coal purchasers or both. *Annual Energy Outlook 1993*, Energy Information Administration, U.S. Department of Energy (Dec. 1992) at 49. Thus, the issues presented by the Petition have implications for collective bargaining in the electric power industry and for the ultimate cost to tens of millions of consumers of electricity.

ARGUMENT

Article XX(d)(1) of the NBCWAs required signatory and me-too operators to make contributions to the UMWA Trusts based on tons of coal produced and to contribute on a "cents per hour" basis for certain work performed by UMWA employees. In addition, Article XX(d)(1)(v), the so-called "purchase of coal" clause, required contributions based upon tons of bituminous coal purchased by a signatory or me-too company, for which contributions had not already been made under Article XX(d)(1).[3]

[3] Although the Court of Appeals' decision specifically addressed the impact of the evergreen clause on the per-ton contribution requirement of Article XX(d)(1), the Trustees have contended that their evergreen theory applies equally to Article XX(d)(1)(v). *See Associated Electric Cooperative, Inc. v. Holland*, C.A. No. 93-0944-HHG (D.D.C.).

Although AECI is entirely out of the business of mining bituminous coal, it continues to employ some UMWA workers in land reclamation projects. Under the Court of Appeals' reading of the evergreen clause, AECI must continue to make pension contributions for these employees at BCOA-negotiated rates, even though: (1) AECI may never agree to another NBCWA; (2) AECI is no longer engaged in the production of coal; and (3) AECI is not a member of BCOA. When AECI assumed the obligations of the 1978 NBCWA, it did not know that it would be deemed to have waived forever its right to select a bargaining representative other than BCOA to bargain with the union on the critical issue of pension benefits for these workers.

Likewise, given the Court of Appeals' interpretation of the evergreen clause, under Article XX(d)(1)(v), AECI is required to continue, potentially in perpetuity, to make contributions to the Trusts at BCOA-negotiated rates for every ton of bituminous coal it purchases to fire its power plants [4]—whether or not it ever signs another NBCWA. When AECI assumed the obligations of the 1978 NBCWA, it did not know it was subjecting itself to a perpetual obligation to make pension contributions for people who are not its employees, based on bituminous coal it purchased after it ceased mining operations, and at rates set in the future by the BCOA.

AECI's situation is not unique. Over 86 percent of the coal consumed in the United States today is used by electric utilities. "The U.S. Coal Industry, 1970-1990: Two Decades of Change," Energy Information Administration, U.S. Department of Energy (Nov. 1992) at 101.

---

[4] In order to comply with the Clean Air Act, AECI's plans for the future include a switch to non-bituminous, low-sulphur Western coal. However, AECI also has retained title to its Missouri bituminous coal reserves. If AECI mines or buys bituminous coal at any time in the future, the Court of Appeals' decision would require contributions to the Trusts.

Electric utilities accounted for virtually all of the growth in U.S. coal consumption between 1970 and 1990. *Id. See also*, "Annual Energy Outlook 1993", Energy Information Administration, U.S. Department of Energy (Dec. 1992) at 61, 65. Conversely, coal holds a dominant share of the electric power fuel market. Slightly more than half of all operating power plants burn coal and the 54 largest electric power plants currently on utilities' drawing boards are coal fired. "Inventory of Power Plants In the United States, 1991", Energy Information Administration, U.S. Department of Energy (Oct. 1992) at 1.

The interdependence of the coal and electricity markets is expected to continue into the next century. The Energy Information Agency projects an increased demand for electricity between the present and 2010 and, as a result, a marked increase in coal production. "The U.S. Coal Industry, 1970-1990" at 59-61. For now and into the foreseeable future, most contributions made to the Trusts under the purchase of coal clause will be made by members of the electric power industry. Most of these companies, under the Court of Appeals' rationale, will be forced to pay pension and benefit contributions, not for their own employees and not because they agreed to make such contributions, but rather to offset the contributions that by contract should be paid by BCOA member companies. This is not, as the Trustees contend, a case of limited import that affects only a small number of coal mine operators. The decision of the Court of Appeals amounts to the imposition of huge obligations on the electric utility industry which in turn will be borne by millions of consumers of electric power.

CONCLUSION

For these reasons set forth by Petitioners and for the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE E. ANDERECK *
PATRICK A. BAUMHOER
ANDERECK, EVANS, MILNE,
PEACE & BAUMHOER
1111 South Glenstone
Springfield, Missouri 65808
(417) 864-6401
Counsel for Amicus Curiae
Associated Electric
Cooperative, Inc.

June 14, 1993

* Counsel of Record